Supreme Court, U. S.
FILED
JAN 18 1978
MICHAEL RODAK, JR., CLERK

No. 77-583

In the Supreme Court of the United States

OCTOBER TERM, 1977

STANLEY FORSACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-583

STANLEY FORSACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was deprived of the effective assistance of counsel when he voluntarily made certain uncounseled statements after his arrest.

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of engaging in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1). Petitioner was sentenced to three years' imprisonment and fined $5,000. The court of appeals affirmed without opinion (Pet. App. 1a-2a).

The evidence at trial showed that petitioner, who was not a federally licensed firearms dealer (Tr. 212), sold guns to undercover Alcohol, Tobacco and Firearms (ATF) agents on three occasions in September and October of 1976 (Tr. 122, 127, 135).

The evidence at a pre-trial suppression hearing showed that when petitioner was arrested on October 27, 1976, he was taken to a police station in Nassau County for fingerprinting and processing and was then brought before a federal magistrate in Brooklyn less than five hours after his arrest (Tr. 4-7). Petitioner was given *Miranda* warnings twice before his initial appearance. Although the agents, on the way to Brooklyn, asked petitioner if he would cooperate by giving information about his source of firearms, petitioner stated only that "he wanted to think about it" (Tr. 7) and made no incriminating statements.

At his initial appearance, the magistrate assigned Legal Aid Society counsel to represent petitioner (Tr. 9). After the hearing petitioner was released on his own recognizance (Tr. 8-9, 58). An ATF agent then asked petitioner if he could give him a ride home, and, as petitioner testified, "I thought he was kind enough to do it and I accepted the offer" (Tr. 59). During the ride home, the agent again asked petitioner if he would cooperate, and petitioner agreed to meet at the agent's office the following day (Tr. 10-11). At that meeting petitioner made statements, which he later moved to suppress, concerning his acquisitions of firearms (Tr. 12-14). The district court denied petitioner's suppression motion after a hearing, holding that the statements were given voluntarily in a non-custodial setting (Tr. 102-104).

2. Petitioner's claim in this Court, insofar as we can understand it, appears to focus exclusively upon an alleged violation of his Sixth Amendment right to the assistance of counsel because his attorney was not present at the time he made the statements in question. He does not now challenge the voluntariness of his statements, but only the legal sufficiency of his waiver of counsel. We

note at the outset that petitioner's suppression motion did not rely on any claim of deprivation of assistance of counsel. This omission constitutes a waiver of the claim under Fed. R. Crim. P. 12(f), since a suppression motion preserves only those grounds expressly relied upon in support thereof. See, *e.g.*, *United States* v. *Braunig*, 553 F. 2d 777, 780 (C.A. 2); *United States* v. *Schwartz*, 535 F. 2d 160, 163 (C.A. 2); *United States* v. *Barber*, 495 F. 2d 327, 329 (C.A. 9); cf. *Wainwright* v. *Sykes*, No. 75-1578, decided June 23, 1977.

Petitioner's contention is, in any event, without merit. The district court concluded, and the record clearly shows, that petitioner did make a knowing and voluntary waiver of his right to counsel. As the district court found, petitioner freely appeared at the ATF office, having had an opportunity overnight to reflect upon his alternatives, and he "proferred his services" (Tr. 103). Accordingly, petitioner's reliance on *Brewer* v. *Williams*, 430 U.S. 387, is misplaced. In *Brewer*, the incriminating statements were induced by police custodial interrogation in the face of the defendant's refusal to waive his right to counsel (*id.* at 399, 405). In the instant case, petitioner made no potentially incriminating statements until after he voluntarily went to the ATF office. Cf. *Beckwith* v. *United States*, 425 U.S. 341.[1]

Where, as here, no claim of coercion has been made, and the record shows that petitioner received *Miranda* warnings at least three times, spoke with counsel at his appearance before the magistrate, and voluntarily went to

---

[1]In fact, the statements used at trial, detailing how petitioner acquired the guns he sold the agents, were not damaging to petitioner's defense. During his testimony, petitioner himself told of selling the weapons and testified about their sources as part of his entrapment claim (Tr. 311, 313-314, 321-322, 336, 355-357).

the agent one day later to cooperate, the government has met its burden of showing that petitioner knowingly and voluntarily waived the right to have counsel present. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218; *Brewer* v. *Williams*, *supra*, 430 U.S. at 404-406; *United States* v. *Garcia*, 377 F. 2d 321, 324 (C.A. 2), certiorari denied, 389 U.S. 991.[2]

3. Petitioner also presents as a question (Pet. 2), although he does not further argue it, the claim that his statements to the agents were the product of a delay in presenting him to the magistrate. Since, however, the statements in question were made the day following his initial appearance before the magistrate, any delay in presenting him is wholly irrelevant. and this claim is frivolous. See *Johnson* v. *Louisiana*, 406 U.S. 356, 365.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

---

[2] *Massiah* v. *United States*, 377 U.S. 201, relied on by petitioner (Pet. 5), is inapposite. There the Court held that incriminating statements surreptitiously obtained (by hidden radio transmitter) after the defendant's indictment violated the defendant's right to counsel. Those circumstances obviously precluded a finding that the defendant made the statements after a knowing waiver of his right to counsel. Here, in contrast, there was nothing surreptitious about the circumstances in which the statements were made.

DOJ-1978-01